

An Explanation of Dealer Responsibility for Equipment Roll Over Protection Structures (“ROPS”)

Equipment Dealers are generally familiar with the term “roll over protective structures” (ROPS), but judging from discussions with dealers and the number of inquiries, there is considerable misunderstanding regarding the requirement for ROPS and a dealer’s legal responsibility and potential liability associated with ROPS. This discussion is intended to familiarize the equipment dealer with the legal requirements for ROPS, legal concerns if ROPS are not in place, and to provide some suggestions on ways to minimize potential liability.

Farm safety concerns, including ROPS, are now in the forefront, with the U.S. Congress considering bills which would require retrofitting of tractors and various state legislatures proposing state laws reinforcing the current federal requirements. For the manufacturer and dealer, ROPS are a product liability and dealer negligence issue when ROPS are not installed or maintained on a tractor.

OSHA Requirements

The Occupational Safety and Health Administration (OSHA) requires ROPS to be installed on tractors only when such tractors are operated by employees. Contrary to the opinion of most people, OSHA does not require manufacturers or dealers to equip tractors with ROPS. OSHA first issued requirements on “construction” tractors in 1972 and required retrofits on all such tractors manufactured after July 1, 1969. The regulation on agricultural tractors was issued in 1975 and requires tractors manufactured after October 25, 1976 of over 20 HP engine used in agriculture to be equipped with a seatbelt and ROPS. No retrofits are required on tractors manufactured prior to that date.

Exemptions

There are several exempt uses for which ROPS are not required: (i) low profile tractors when used in orchards, vineyards or hop yards; (ii) low profile tractors when used inside a farm building or greenhouse; and (iii) tractors used with mounted equipment which is incompatible with ROPS, such as corn pickers, cotton strippers, vegetable strippers and fruit harvesters.

Structural Requirements for ROPS

In response to the OSHA regulations, the manufacturers, in conjunction with the American Society of Agricultural Engineers, developed structural requirement for ROPS which have been adopted by OSHA. Manufacturers voluntarily agreed to fit tractors with OSHA approved ROPS and now ROPS are standard equipment.

Problems with Trade-Ins

Since all tractors manufactured since the 1970's have ROPS in place when delivered to the dealer, what is the problem? The dealer's concern is usually not with the new tractors but used trade-ins which were manufactured before 1976 or "pre-ROPS". Suppose a dealer takes a 1965 tractor as a trade-in. The tractor was manufactured pre-ROPS. Should the dealer be concerned about reselling the tractor without ROPS in place? The short answer is "yes," for although there are no OSHA requirements, all of the literature and the safety issues indicate that ROPS are critical to reducing injuries or fatalities resulting from roll over of tractors. This then becomes a legal question as to whether the dealer should retrofit tractors with approved ROPS, knowing that ROPS are a very important safety feature, as much as or more important than guards and other safety equipment.

Case in point. In Hammond v. International Harvester, a 1982 U.S. Court of Appeals case out of Pennsylvania, International Harvester was held liable for delivering a skid loader when the manager of the farm had ordered the tractor without ROPS. A farm employee, while operating the skid loader, fell to the side of the tractor, inadvertently striking the foot pedal. This action released the boom arm, causing the boom arm to pin him and resulting in his death. The evidence showed that if side screens had been in place, the operator would not have been able to maneuver into a position where he could have been crushed by the boom. The court held the International Harvester tractor was defective because it lacked ROPS and, therefore, the manufacturer was held strictly liable for consequences of the defect. It was irrelevant the farm manager ordered the skid loader without ROPS, since the employee/operator did not request the skid loader be delivered with the ROPS removed.

The Hammond case points out the potential product liability exposure of the manufacturer and, possibly, the dealer, with respect to ROPS, even though the requirements for ROPS is placed upon the user and then, only in instances where the tractor is operated by an employee. It can be noted that although the OSHA regulations do not differentiate on the basis of the number of employees, Congressional appropriations have generally restricted ROPS enforcement to farms with ten or more employees.

What can dealers do?

What can you do as a dealer with tractors for which you cannot purchase ROPS retrofitting, or for which the cost of retrofitting ROPS could be more than the value of the tractor? The prudent approach is to take the tractor as a trade-in or, if accepted on trade-in, not to resell it.

While there are several exceptions to requirements for ROPS, such as working around orchards and barns, as a dealer, you should not make a judgment as to the intended use of the tractor when in the hands of your customer. The tractor should be delivered with ROPS in place and if the purchaser wants to remove ROPS, then that is the purchaser's decision. In

some cases, the purchaser may want to save money by ordering a tractor without ROPS. A dealer should not order tractors without ROPS in this day of safety and liability consciousness.

Manufacturer Safety Programs

Manufacturers are forcing dealers to be safety conscious. For example, John Deere has embarked on a dealer safety awareness program by providing in the Floor Plan Promissory Note the following Provision, "I have checked the following items for presence, condition and function, as applicable to the John Deere machine(s) listed above, and will repair, replace or complete, if necessary: (a) Operator's Manual, (b) safety signs/ SMV emblems and reflectors, guards and shields, (d) lights, brakes, steering and safety switches, and (e) authorized safety Product Improvement Programs." Though ROPS are not specifically mentioned, they could be included in the list of safety undertakings a dealer must agree to before receiving floor planning on used equipment.

The affect of the above statement on the dealer is that while the dealer is not required to comply with the safety requirements, the dealer nevertheless must certify that such safety requirements have been met in order to obtain financing on used equipment.

NAEDA Recommendations

The North American Equipment Dealers Association (NAEDA) has considered the potential dealer liability at some length and is recommending that the Retail Purchase Order and Equipment Repair Delivery Receipt include a customer certification as follows:

"I have read this Delivery Acknowledgement and understand its provisions. Furthermore, I acknowledge the safety device(s) or ROPS are missing and I accept the machinery/equipment without the noted ROPS and safety devices and waive any claim(s) against you (the dealer) and additionally agree to indemnify and hold you (the dealer) harmless for any claims, injuries or liabilities arising out of safety devices or ROPS not being in place on the above referenced machinery/equipment, whether resulting from my use of or the use of any agent, servant or employee."

The forms also provide a space for listing any missing safety equipment and/or ROPS. Similar language would be included in delivery acknowledgement forms for new and used equipment.

The dealer certification and customer acknowledgement that the customer has been advised of the safety features and proper operation of the equipment and acknowledges reviewing the instructions goes beyond the concern for ROPS but does raise the level of safety awareness to the dealer and to the customer. Even such an all encompassing certification does not ensure that the dealer will not be held liable for injuries resulting from missing ROPS. As between the dealer and the purchaser/customer, the certification is evidence that the purchaser acknowledges the safety devices and ROPS are or are not in place.

The purchaser cannot, however, acknowledge for another person (such as an employee) that ROPS are not in place and cannot waive on behalf of the other person any rights against the dealer.

The certification is intended to address this specific concern by requiring the customer certifying to agree to indemnify and hold the dealer harmless. This may not be totally effective in all cases, but at least gives the dealer another person or entity to look to in the event of claims arising out of ROPS not being in place.

In addition to OSHA regulations, states are beginning to require ROPS. California has enacted a ROPS requirement which generally tracks the OSHA standards by requiring ROPS on agricultural and industrial tractors manufactured after October 25, 1976. The California law also requires employees be informed of operating instructions at least annually, and for the instructions to be posted.

In summary, consider the following regarding ROPS:

- OSHA imposes a requirement on a customer rather than on the manufacturer or the dealer that ROPS be in place. This does not absolve the manufacturer or dealer in claims for injuries from operating tractors without ROPS. The fact that the tractor was sold without ROPS in place can impose liability on the manufacturer and, possibly, the dealer.
- Tractors manufactured pre-ROPS should be retrofitted with ROPS and if it cannot be retrofitted, a dealer should give serious consideration to not selling the used tractor. A practical solution may be for a customer to sell the tractor to a third party and use that cash as part of the down payment.
- Do not order tractors without ROPS. If a customer wants ROPS removed, let the customer remove the ROPS after delivery.
- Consider using the NAEDA suggested language for customer certification on equipment repair and delivery receipt and purchase orders.

Source: James D. Keast, Past NAEDA General Counsel